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# THE IMMUTABLE FOUNDATION OF LAW

By WILLIAM J. KENEALY, S.J.\*

Since 1955 Professor George W. Goble and I have conducted a discussion about the validity of the scholastic philosophy of natural law.<sup>1</sup> The discussion has produced agreement on some aspects of the subject, but has indicated disagreement on others. As Professor Goble states in his latest article, *The Mutability of Law*, the most significant unresolved issue is that, whereas scholastic philosophy accepts some principles of law as "immediately evident, certain, immutable and universal," he says that "it is highly probable that there are no such principles."<sup>2</sup> This is indeed the nub and substance of the controversy. Since law exists in the practical order of doing, rather than in the speculative order of being; since it deals with means and ends, rather than with causes and effects; since it embodies the "ought" rather than the "is"; and since it imposes a moral necessity upon the physically free actions of human beings living and acting in the constantly changing conditions and circumstances of dynamic human society:—it is obvious that the science of law involves a tremendous area of mediate evidence, probability, mutability, and particularity. This is not in dispute. Upon this, Professor Goble and the scholastics emphatically agree. The critical issue is: whether or not, despite the mediate evidence, the probabilities, the mutabilities, and the particularities, there are *any* principles of law which are immediately evident, certain, immutable, and universal.

In approaching the resolution of this critical issue, Professor Goble finds scholastic terminology extremely confusing, particularly regarding the distinctions between fundamental and derivative principles, between natural and derivative rights, between principles and rules and rights, and the relationships between all three. This is understandable. Although I am inclined to think that Professor Goble has passed over my explanations of these terms and distinctions without sufficient consideration and reflection, I readily concede that the chief difficulty lies in the inadequacy of my own exposition of them, and my consequent failure to dissipate his erroneous preconceptions of the meaning of the scholastic doctrine. I do not think that either of us is concerned "primarily with words as things." We are both a bit elderly for that! Rather I believe we are both sincerely concerned with *words* in so far as they represent *concepts*, which in turn rep-

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<sup>1</sup> The articles in the series are Goble, *Nature, Man, and Law*, 41 A.B.A.J. 403 (1955); Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAW. 259 (1955); Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAW. 226 (1956); Kenealy, *Scholastic Natural Law—Professor Goble's Dilemma*, 3 CATHOLIC LAW. 22 (1957); Goble, *The Mutability of Law*, 11 HASTINGS L.J. 95 (1959).

<sup>2</sup> Goble, 11 HASTINGS L.J. 95 (1959).

resent *things*. For the function of words on the tongue or page is to communicate concepts in the mind, and the function of concepts in the mind is to mirror the reality of things. Nevertheless, a careful reading of our previous articles seems to disclose that, despite our good intentions, we have sometimes used the same words to express somewhat dissimilar concepts, and consequently somewhat dissimilar things. This, I dare say, is not a unique development in the history of controversy. Nor is it a particularly surprising one in the ancient argument about the philosophical foundation of the law.

For the common law was developed over several centuries by great judges and legal scholars who inevitably developed and refined its technical legal terminology, which is not easily understood by those who have not studied it; and the confusion of the non-lawyer is compounded by the very fact that legal terminology is frequently similar to, but not always identical with, that of popular speech. Likewise, scholastic philosophy, with its origin in Aristotle, was developed over some twenty centuries by some of the greatest philosophers in history, who inevitably developed and refined its technical philosophical terminology, which likewise is not readily comprehended by those who have not studied it; and the confusion of the non-scholastic is compounded by the fact that scholastic terminology is frequently similar to, but not always identical with, that of popular speech, that of other legal philosophies, and that of the civil and the common law. Hence, the critical issue of our discussion cannot even be joined until we have a meeting of minds on the *meaning* of the scholastic doctrine. For, as stated in my first article, *Whose Natural Law?*, Professor Goble sets up and rejects a concept of natural law which would also be repudiated by every scholastic from Thomas Aquinas to Heinrich Rommen.<sup>3</sup>

Hence, I shall attempt in this article to rectify the deficiencies of my previous exposition, and to clarify the *meaning* of the scholastic doctrine that there are *some* principles of law which are immediately evident, certain, immutable and universal. Although I must repeat to some extent the ideas I hope to clarify, the limitations of time and space force me to presuppose much that I have said previously, and consequently I fear that what I now have to say may be somewhat less than clear or even informative to those who have not read my previous two articles. Such are the hazards of a running debate!

## I

First: it is not surprising that *some facts*, which cannot be "proved," are nevertheless immediately evident and certain. Three such facts are: one's own *personal existence*, the existence of *objective reality* independent

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<sup>3</sup> Kenealy, 1 CATHOLIC LAW. 259 (1955).

of the mind, and the *capacity of the mind* to know some truth with certitude. Such facts cannot be proved, in the sense of proceeding from the unknown to the known, precisely because they are *immediately* evident and certain. Every attempt to prove them presupposes their existence, and their existence is affirmed willy-nilly by every attempt to deny them. Second: it is not surprising that *some principles*, which cannot be "proved," are nevertheless immediately evident and certain, and also immutable and universal. Three such principles are: the principle of *contradiction*, that a thing cannot be and not be at the same time under the same aspect; the principle of *sufficient reason*, that whatever exists must have a sufficient reason for its existence; and the principle of *causality*, that whatever exists contingently, or begins to be, must have a cause of its existence. Such principles cannot be proved, by moving from the unknown to the known, precisely because they are the *immediately* evident and certain starting points of all human knowledge. Every forward march of human knowledge presupposes them. It is simply impossible to prove, disprove, change, or find a single exception to them. For, properly understood, they are *immediately* evident, certain, immutable and universal. Professor Goble acknowledges that the above facts and principles have the qualities which I have just ascribed to them.<sup>4</sup>

However, the above principles are all *speculative* truths, that is, truths in the order of *being*, known by the intellect in its speculative function of perceiving existences and essences, causes and effects, the "is" of reality. Speculative knowledge undoubtedly comes first in time of the human mind, and the speculative principles above indicated are presupposed in all human knowledge. But there are also *practical* truths, that is, truths in the order of *doing*, known by the same intellect but in its practical function of perceiving means and ends, goodness and badness of conduct, and the "*ought*" of reality. Moreover, just as there is a logical starting point of the speculative order in its first or fundamental principles, so also there is a logical starting point of the practical order in its first or fundamental principles. There has to be a logically first "*ought*" or there could be none at all. Corresponding to the conceded qualities of the fundamental principles of the speculative order, scholastic philosophy maintains that the fundamental principles of the practical order are also immediately evident, certain, immutable, and universal. Because they are "*ought*" principles, they call them the fundamental principles of the *natural law*. What are they?

## II

The *fundamental principles* of the natural law are divided into a single primary principle and a few immediately inferable secondary principles.

<sup>4</sup> Goble, 11 HASTINGS L.J. 95, 108, n.39 (1959).

The *primary principle* may be briefly expressed in verbal formulas such as, "What is good ought to be done, and what is evil ought to be avoided," which obviously includes, "What is just ought to be done, and what is unjust ought to be avoided." An instance of a *secondary principle* would be, "No one ought to deprive another unjustly of his life (or liberty, or property, or reputation, etc.). What do these principles *mean*? Let us first consider the primary principle, that good ought to be done and evil ought to be avoided. It is obvious that three different concepts are involved: "good", "evil", and "ought". The first two are opposites, and the third is distinguished from both. Hence:

1. *The concepts of good and evil.* Generically, the concept of "good" means suitability or conformity to nature; and the concept of "evil" means unsuitability or difformity from nature; whatever that nature may be. Wherefore, even in popular usage: the good clock tells time, the bad one does not; the good crocus blooms, the bad does not; the good cow gives milk, the bad does not; the good comedian lays them in the aisles, the bad does not. The concept of *moral* goodness, which is proper to *man as man*, refers to his specifically rational and human nature. And more specifically: by a morally "good" act is meant a physically free act conformed to, and perfective of, human nature adequately considered (and therefore conducive to that nature's end); by a morally "evil" act is meant a physically free act difformed from, and degrading to, human nature adequately considered (and therefore repulsive to that nature's end). By human nature *adequately considered* is meant the operative human person in the light of the internal harmony of his faculties and the external harmony of his relations with his Creator and his fellow creatures.

This is the *meaning* of the concept of "good", and the concept of "evil", in the primary principle of the natural law. They are universal concepts. As such, they do not contain any, and they prescind from all, particular acts. They originated, as do all universal concepts, from an *a posteriori* consideration of particulars. They are formed by the normal and familiar intellectual process of abstraction and precision. Obviously then, these concepts are not *immediately* practical; because they do not, *of themselves*, determine the goodness or badness of any particular act. But just as obviously, they are of critical *mediate* practicality; because they constitute the norm which enables us, by the *mediation of empirical knowledge* of the object, motive and pertinent circumstances of a particular act or practice, to judge or at least to argue about the moral goodness or badness of the particular act or practice. And the conclusion may be true or false, certain or probable, or just plain baffling. But Professor Goble says:<sup>5</sup>

<sup>5</sup> *Id.* at 100.

However, my main criticism with regard to the principle, "What is good is to be done," is and was that since the meaning of the word "good" must be determined by particular acts for which it is used as a label, and these acts change from age to age, and from place to place, the meaning of the word, and consequently the meaning of the principle itself, must change. I think it would be agreed that the word "good" has no meaning or utility except as it is related to or made to comprehend particular acts.

The above quotation demonstrates strikingly, it seems to me, that Professor Goble still misses the meaning of the concept of "good" in the primary principle of the natural law. His "main criticism" remains based upon the notion that "the meaning of the word 'good' must be determined by particular acts for which it is used as a label." But the word is *not* used to label any particular acts, and its meaning is *not* determined by them. The word represents the universal *concept* of "conformity to human nature" as explained, and the concept constitutes the *metaphysical* norm or standard or measure of the morality of particular acts. The meaning of the norm is not determined by the act; the morality of the act is determined by applying the norm. The familiar ruler is a norm of constant length designed to measure particular things of different lengths, in different places, at different times. But the length of the ruler is not determined by the length of the thing measured; the length of the thing measured is determined by applying the ruler. Professor Goble's cart is pulling his horse. Since his "main criticism" is based upon a misunderstanding of the fundamental concept of "good" in the most fundamental principle of the natural law, it is not surprising that he should find the philosophy of the natural law "confusing and contradictory."

It is true, of course, that the "utility" of the concept, as distinguished from its meaning, consists in its applicability to particular acts. That is the utility of any norm. Since the concept of "good" does not contain any particular act, it is obvious that its application requires empirical knowledge, *outside the concept*, of the particular act in question. The norm is the constant major premise; empirical knowledge of the particular act is the minor premise; the morality of the act is the conclusion. In shorthand: an act conformed to nature is good; but this act is conformed to nature; therefore this act is good. After all, even the ruler is not *immediately practical*, because it does not, *of itself*, tell us the length of anything it is designed to measure. Its practicality is *mediate*, because it is a norm which enables us, *by application*, to measure the length of extended things. The ruler, of course, is a *physical* norm capable of easy and mechanical application to material things. I trust that no one will misconstrue my illustration of the physical ruler as implying that the *metaphysical* norm of morality is either easily or mechanically applied to the almost infinite number, variety and complexity, of particular acts and practices performed by physically free

agents in the constantly changing conditions and circumstances of dynamic human society. On the contrary, the tremendous difficulty of the application has given birth, growth, and indispensability to the elaborate normative sciences of ethics and law, with their certainties, probabilities, possibilities, conjectures, speculations, frustrations, hopes and ideals. And jobs to law professors!

Under the mistaken impression that the word "good" in the *verbal* enunciation of the primary principle of the natural law is simply a "label" for particular acts and practices *thought* to be "good" or classified as such, Professor Goble appeals to data from the speculative (*i.e.* non-normative) science of anthropology.<sup>6</sup> He recites a catalog of social practices which we both agree are morally evil, but which in various parts of the world at various times in history, past and present, undoubtedly met or meet with approval by some social groups, such as: cannibalism, infanticide, human sacrifices, mercy killings, bodily mutilations, polygamy, polyandry, sexual promiscuity, human slavery, caste systems and racial segregation. Clearly, if the concept of "good" in the primary principle means what Professor Goble thinks it means, then the philosophy of natural law has been solemnly and finally interred, after a curious longevity, in the anthropological data he has unearthed. Indeed, if any of these evil practices is contained in, or is inferable from, the concept of "good" as explained, then I will be happy to join the Professor in chanting the requiem of scholasticism. But it looks as though the funeral will have to be held up. Because, as we have seen, the concept does not mean what Professor Goble thinks it means; and the concept cannot be charged with what it does not contain, or with what cannot be inferred from it. Yet there remains a very pertinent question: if the concept of "good" is universal and valid, *how* is it that these admittedly evil practices obtained the approval of sincere men? *How* is it that evil acts can be sincerely accepted as good acts?

The preface to the answer is that sincerity is not the criterion of truth of any order of knowledge, speculative or normative; or, as Justice Holmes once put it, "Certitude is not the criterion of certainty." In previous articles of this series, I have discussed natural law epistemology.<sup>7</sup> The substance of the answer, however, is that the error of those who sincerely approve objectively evil practices arises from a faulty *application* of the concept. As we have already seen, judgment of the morality of a particular act is a *conclusion* of a process of reasoning in which the major premise is a *metaphysical constant* (abstract universal concept of human nature adequately considered) and the minor premise is an *empirical variable* (per-

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<sup>6</sup> *Id.* at 101-04.

<sup>7</sup> Kenealy, 1 CATHOLIC LAW, 259, 264-66 (1955); 3 CATHOLIC LAW, 22, 30-36 (1956).

ception of the object, motive, and pertinent circumstances of this particular act). Hence, assuming as the question does, that the major premise is universal and valid, it follows clearly that the error in the conclusion is chargeable, either to falsity in the empirical perception supplying the minor premise, or to lack of logic in drawing the conclusion from the premises. After all, as Professor Goble concedes, the principle of contradiction is immediately evident, certain, immutable and universal. Therefore a given particular act, at a given particular time, in given particular circumstances, either is or is not conformed to human nature. But sincere men can be mistaken as to whether it is or is not so conformed. Wherefore sincere men can mistakenly approve objectively evil practices.

For exactly the same reason, two scholastics, in the same room at the same time, can disturb the public peace with tumultuously sincere disagreement about the morality of a particular act. This does not imply, by any means, that the Hottentot or the scholastic always or habitually or even often reasons about morality in terms of formal syllogisms, but rather that such is an accurate philosophical analysis of the informal thinking involved. The anthropological evidence adduced by Professor Goble clearly indicates that the groups engaged in the above evil practices thought that they were "good practices." But the point is that the evidence does not even suggest that they thought it was "good" to act contrary to nature, or "evil" to act according to it. There is not a scintilla of evidence, anthropological or otherwise, to suggest that normal men, anytime or anywhere, ever thought it was "good" to degrade their human nature or "evil" to perfect it. A few unfortunate and abnormal men might appear to think that way, but other men in white coats keep them in check.

Change in the conclusion about the morality of a particular act may obviously occur by subsequent correction of previous error. Moreover, since the circumstances of an act affect its relationship to human nature, a change in the circumstances may well change the conclusion about the morality of the act. A legal analogy may be seen in the case of *Smith v. Allwright*<sup>8</sup> which overruled *Grovey v. Townsend*<sup>9</sup> because a change in the Texas primary system affected, not the meaning, but the application of the constitutional concept of "abridgment by a State of the right to vote." Speaking for the Court, Justice Reed justified the reversal as "an application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself." Furthermore, change in the conclusion about the morality of an act may also come about by reason of the evolution of a deeper appreciation of human nature itself. Human nature itself does not change because we understand it better, but it would be

<sup>8</sup> 321 U.S. 649 (1944).

<sup>9</sup> 295 U.S. 45 (1935).



strange indeed if we did not understand it better after centuries of diligent effort. A legal analogy may be seen here too, I think, in the momentous decision of *Brown v. Board of Education*<sup>10</sup> which, combined with subsequent decisions, overruled *Plessy v. Ferguson*<sup>11</sup> because, it seems to me, the Court finally evolved a deeper appreciation of the reality intended by the constitutional concept of "equal protection of the laws." This deeper appreciation did not change the Constitution, but it did convince the Court that the judicially-formulated interpretative principle of "equal but separate facilities" did not measure up to the reality intended by the constitutional concept of "equal protection of the laws." *Smith v. Allwright* illustrates an *application*, *Plessy v. Ferguson* illustrates an *appreciation*, of a constitutional concept. Both illustrations are analogies. Like all analogies, they limp a bit. For two contrasted analogues are the reality *intended* in a written document and the reality *existing* in objective human nature.

What I have said about the evolution of a deeper appreciation and better understanding of human nature presupposes, of course, that the concept of human nature is capable of clarification and explication. This, I hope, may help to bring Professor Goble and myself closer to a meeting of minds. Human nature "adequately considered" obviously does not mean "perfectly known." Only Infinite Intelligence knows anything perfectly. All human knowledge is finite, imperfect, and hence capable of improvement. One man's concept of human nature, as of anything else, is clearer than another's. Every man's concept can become clearer. The universality of a concept does not imply equal clarity in the minds of all. The immutability of a concept does not imply fixed clarity in the mind of any. The universality and immutability of the concept of human nature simply indicate that, whatever the subjective clarity in any given mind, the concept always and in every given case represents and means this object: "*the objective reality independent of the mind which constitutes essential human nature and exists immutably in all men.*" As knowledge of that reality grows, clarity of concept grows. But it does not become a concept of something else. It becomes a clearer concept of the same reality. To hazard another illustration of the metaphysical by the physical: as the man growing in size remains the same man, so the concept growing in clarity remains the same concept. That is, as increasing knowledge of human nature sharpens the focus to a more accurate reflection, the concept still continues to represent "*the objective reality independent of the mind which constitutes essential human nature and exists immutably in all men.*" Absent such a common and constant concept there could be no discussion about "man," since there could be no meeting of minds about the same "thing." But with it, despite the

<sup>10</sup> 347 U.S. 483 (1954).

<sup>11</sup> 163 U.S. 537 (1896).

differences in subjective clarity, since the concept does represent the same "thing," there can be intelligible communication. Hence the concept of "human nature," contained in the concept of "conformity to human nature," is the *metaphysical constant* in the major premise in reasoning about the morality of particular acts. Hence also, the evolution of a deeper appreciation and better understanding of objective human nature clarifies and explicates our knowledge of morality.

2. *The concept of obligation or "ought."* So far we have been considering merely the opposed concepts of "good" and "evil" in the primary principle of the natural law. The third concept, distinct from the other two, is that of obligation or "ought." Granting that "good" means conformed to nature and "evil" means difformed from it, the question arises: is man free to do what is good or what is evil, as he pleases? Obviously he is physically free to do so. The empirical fact of free will demonstrates that those actions we call moral are not subject to that absolute necessity of internal compulsion which we call physical laws. Physical freedom is the *condicio sine qua non* of morality. Freedom and necessity, like good and evil, are opposites. Is physically free man under *any* necessity to do good and avoid evil? The empirical fact of conscience, manifested in the common consent of mankind in all ages, indicates that man is subject to a *moral necessity*, analogous to physical necessity, yet consonant with physical freedom, called obligation, and contained in the primary principle in the concept of "ought." It is a unique and simple concept which defies definition because it has no separable components, but which is immediately perceived by all sane men. It is from an inspection of the three concepts of "good," "evil," and "ought," that the primary principle emerges as immediately evident, certain, immutable and universal. Somewhat as follows.

The human mind, considering man's rational nature, his capacity for action, his physical freedom in action, the conformity (goodness) of some acts to his nature, the difformity (badness) of other acts from his nature, the fulfillment or perfection which is the end of his nature, the desirability and necessity of attaining that end, the possibility of attaining or frustrating that end, the relationship of attainment between good acts and the end, the relationship of frustration between bad acts and the end:—considering such things, the human mind cannot help but *perceive* that, although he is physically free, man "ought" to do good and avoid evil.

The above sentence is not an attempt to "prove" the primary principle. Such "proof," is the sense of *moving from the known to the unknown* "ought," is impossible. It would necessarily presuppose some logically prior "ought"; but there is none. The speculative (positive, empirical or physical) sciences obviously cannot adduce one, for they are exclusively concerned with the "is" of reality, and no one can get an "ought" in front of a

microscope or a telescope. The primary principle contains the logically first "ought" of reality, which is presupposed in every other "ought" known to the practical (normative) sciences. All men accept the primary principle. None deny it. Professor Goble does not deny it. Its denial would frustrate any discussion of morality, good and evil, justice and injustice, rights and obligations, due process, etc., etc. In fact, its denial, when the product of mental disease, has been incorporated into the *insanity* tests of civilized criminal codes. For, *properly understood*, the primary principle is immediately evident, certain, immutable and universal.

Professor Goble, however, rejects the certainty, the immutability, and the universality of the principle. It seems clear that he does so because he does not understand the concepts contained in the principle. In a former article, he wrote:<sup>12</sup>

If we define "good" in general terms, that is, without reference to particular acts, we would have to say something like this, "good is what one ought to do." But if we do that, the principle becomes tautological, i.e., "one ought to do what one ought to do."

Here Professor Goble so completely misses the meaning of the concept of "good" that he actually identifies it with the distinctly different concept of "ought" thereby manhandling the principle into tendentious tautology. A principle as ludicrous as that does not persist for centuries in scholarly thought. In his latest article, thinking that the word "good" is merely a "label" for particular acts thought to be good, he fears that the principle would "freeze" some unnamed and undisclosed code of immutably fixed moral and legal particularities upon the human race for "all eternity." He says:

So if "good" means what the mores says it means, or what the judgment of men of the time believe it to be, what is "good" has not been certain, universal and immutable.<sup>13</sup>

It is indeed fortunate that man's concept of "good" was not frozen 20,000 years ago, or for that matter, 1,000 years ago, after the birth of Christianity and the other great religions. We shall be equally fortunate if we do not freeze it now.<sup>14</sup>

Here again, Professor Goble misses the meaning of the concept of "good" in the primary principle and substitutes a Gallop-Poll concept of "particular acts said to be good by contemporary mores." But even pollsters occasionally ask the philosophical question "Why?" Why is the act said to be good by the mores? Surely, not just because it is done, or just because it is thought to be good. In his latest article, Professor Goble makes

<sup>12</sup> Goble, 2 CATHOLIC LAW. 226, 229 (1956).

<sup>13</sup> Goble, 11 HASTINGS L.J. 95, 103 (1959).

<sup>14</sup> *Id.* at 104.

it clear that he thinks racial segregation morally evil. But *why* does he think so? Because the mores *says* so? But *does* the mores say so? And *whose* mores? If some group's mores says so, *why* does it say so? What *norm* of morality does the group utilize to judge its own mores? Surely, not its own opinion, which would be tantamount to saying: "We think segregation is evil, because we think segregation is evil." What *norm* does Professor Goble use? Conformity to group opinion, or conformity to objective human nature? If he accepts the primary principle with *probability only*, does he think that segregation is only *probably* evil, and what is his reason for *doubt*? Probable assent is assent with doubt, and doubt is generated by *prudent fear of error*. What is his fear? Apparently it is the fear of a completely closed and immutable "system" or "code" of moral and legal particularities! As a scholastic, I never heard of any such unnamed and undisclosed system; and, as we have seen, no such closed system can be implied from the primary principle of the natural law properly understood.

### III

The *primary* and *secondary* principles constitute the *fundamental* principles of the natural law. Since justice is a species of goodness, the primary principle already contains, "what is just ought to be done, and what is unjust ought to be avoided." However, the human mind, inspecting essential human nature as it exists objectively in men, *immediately* perceives that life, liberty, property, reputation, sexual faculties, and a few things of similar value, pertain directly to the necessary perfection and the end of *man as man*. Hence, without the mediation of argument, the human mind perceives, as *immediate specifications* of the primary principle, a few *secondary principles* of the natural law, such as: "No one ought to deprive another *unjustly* of his life (or liberty, or property, or reputation, or use of his sexual faculties, etc.). These few secondary principles, because they are *immediate* specifications of the primary principle, participate in the certainty, immutability and universality of the primary principle. The significant feature of all *fundamental* principles is that they are truths which cannot be "proved" by argument *mediating* between the unknown and the knowable, because they are *immediately* evident from a consideration of essential human nature in all men.

All other principles of natural law are called *derivative principles*. They are clearly distinguished from the fundamental principles by the *way* they are known, and frequently by their consequent qualities. The *derivatives* do *not* share equally, some do not share *at all* in the certainty, immutability and universality, of the fundamental principles. For they do *not* bask in the sunshine of *immediate* evidence. They must be cultivated laboriously in the much dimmer light, sometimes in the darkening twilight of *mediate*

evidence. In the field of derivatives there is certainty, probability, and mere possibility; there is growth, change and improvement. Incidentally, some of the so-called "self-evident" truths enunciated in the Declaration of Independence are *not* immediately evident in the *philosophical* sense; they are rather "commonly-accepted" truths which can be proved by the mediation of rational argument. *Only* the fundamental principles are *philosophically* immediately evident.

That the fundamental principles of the natural law do not imply a closed legal system is clear from the fact that they do not tell us automatically in *concrete applications* what is good or evil, just or unjust, wise or unwise; what is idolatry, murder, theft, calumny or perjury. It is evident from the fact that there are an enormous number of acts that are *indifferent in themselves*, and which receive their morality (and suitable legality) from the *relative elements* of time, place and circumstances, and from the *subjective elements* of intention and motive. The natural law philosophy contemplates the tremendous difficulty in the job of constructing, maintaining and improving a *corpus juris* to meet the needs of constantly changing civil society. The possession of a compass does not eliminate the navigator's job.<sup>15</sup>

Professor Goble is puzzled by my use of the term "rules" of law as distinguished from the term "principles" of law. The two terms are sometimes, and properly, utilized interchangeably. Nevertheless, the distinction is valid if it corresponds to an objective difference in the things signified. I think it does. In the context of the distinction, rules of law signify particular regulations, judicially formulated or legislatively enacted, as the specific means selected for the purpose of applying the abstract and universal principles of law to concrete fact situations. As rules, they have, of course, considerably generality; but, unlike principles, they are subject to exceptions strictly so called; moreover, unlike principles, they may require reversal or repeal, change or amendment, sudden or gradual, as experience and wisdom may indicate; and precisely because they are simply practical and subsidiary means, of more or less efficiency, selected to apply the universal principles of law to the changing conditions and circumstances of society. Such, for instance, are the rules of law regulating consideration in Contracts, strict liability in Torts, recording in Property, hearsay in Evidence, witnesses in Wills, negotiability in Commercial Law, felony-murders in Criminal Law, interstate commerce in Constitutional Law, punishments for crimes, statutes of limitation, and a huge multitude of other particularities all the way down to minor procedural matters and traffic rules. It seems to be a derivative principle of law, granting modern highway conditions,

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<sup>15</sup> Kenealy, 1 CATHOLIC LAW. 259, 262-63 (1955).

that vehicular traffic ought to be regulated for the common good. To apply this principle, traffic rules are enacted governing two-way traffic, one-way traffic, downtown traffic, uptown traffic, morning traffic, evening traffic, passenger vehicles, commercial vehicles, fire engines, police cars, speed limits, etc., etc. And all these traffic rules can be, have been, and will be, *changed without changing* the principle that vehicular traffic ought to be regulated for the common good. Wherefore, it seems to me, there is an objective difference between the "principle" of law and the "rules" enacted to apply it. My terminology simply recognized and reflected that objective difference.<sup>17</sup>

#### IV

Professor Goble is unhappy, not merely with the distinction between "principles" and "rules," but also with the distinction between "principles" and "rights," and "rules" and "rights," and the distinction between "natural rights" and "derivative rights." He states:<sup>18</sup>

Then Father Kenealy speaking only of natural rights goes on to say that while they are "absolute and inalienable" they are nevertheless "limited" and are "subject to specification, qualification, explanation [sic.] and even forfeiture of exercise." Natural law principles however are not subject to these limitations and qualifications.

Now I submit that this whole formulation of principles, rules and rights, is highly artificial and full of incongruities. It sets up a purely mechanical pattern for testing and evaluating human conduct . . . .

If the next place Father Kenealy's distinction between rights on the one hand and principles and rules on the other is untenable. When one talks about rights he is talking about rules.

As in the case of the distinction between principles and rules, it seems to me that the distinction between principles and rights, and rules and rights, is valid if the things distinguished are not identical. And they are not identical. A principle is an intellectual truth. A right is a moral power. The principle is the measure of the right; but the measure is not the same thing as the thing measured. A principle is an abstract and universal truth, independent of concrete and particular persons, antedating their birth and surviving their death. A right is a particular moral power, inhering in particular persons, and therefore not antedating their existence and not surviving their demise. The *abstract and universal principles* of law, which are independent of personal vital statistics, seem to me clearly distinguishable from the *concrete and particular rights* which persons have during their lifetime. It is in this sense that I distinguished principles and rules from rights. It is

<sup>17</sup> Kenealy, 1 CATHOLIC LAW, 259, 262 (1955).

<sup>18</sup> Goble, 11 HASTINGS L.J. 95, 97 (1959).

true, however, that when one talks about particular rights, he is *presupposing* the universal principles or general rules which determine the particular rights. Furthermore, when one talks about universal principles or general rules, he is *implying* that the rights which correspond to them are *limited in scope* by the meaning of those principles or rules. Nevertheless, the intellectual principle is not the same thing as the right it determines.

I have discussed the distinctions between fundamental (primary and secondary) principles and derivative principles of the natural law; between principles of law and rules of law; between principles and rules of law and rights. A further distinction between "natural rights" and "derivative rights" is necessary to approach the objections Professor Goble has voiced above. A right is an individual person's moral power to act, to omit, or to exact something of another. It is a *natural* right if it emanates *immediately* from essential human nature: such as my right to *acquire* some material goods necessary to sustain life, which right I have by reason of the fact that I am a *man*. It is a *derivative* right if it arises *mediately* from some adventitious fact: such as my right to *Blackacre*, which right I have by reason of the fact that I *bought* it. And whether natural or derivative, it is a *legal* right if it is recognized or created by the positive law. Obviously however, positive law cannot "create" natural rights, because it cannot create human nature. Human nature and the rights which emanate immediately from it are antecedent, both in logic and in nature, to the organization of civil society and the formation of positive law. Antecedent in logic, because we argue from what man's nature is to what society and its positive law ought to be; we do not argue from society and its positive law to what man's nature ought to be. Antecedent in nature, because man's nature and natural activities make society and its positive law; society and its positive law do not make man's nature. It is "to secure these rights" that "governments are instituted among men." Nevertheless, although positive law cannot *create* natural rights, it is competent to *regulate* their exercise and to determine their just *scope* within reasonable limits. It is for this reason I had said:<sup>19</sup>

Natural law does indeed imply the existence of some human rights which are absolute and inalienable, such as the right to life, worship, marriage, property, labor, speech, locomotion, assembly, reputation, etc. These are absolute in the sense that they derive from human nature; they are not mere handouts from the state; the state is bound to protect them and cannot destroy them even though, by physical force, the state has sometimes prevented their exercise. They are *not* absolute in the sense that they are unlimited in scope. It is a commonplace in classical natural law philosophy that human rights, even the most fundamental mentioned above, are *limited*. They are limited in the sense that they are subject to specification,

<sup>19</sup> Kenealy, 3 CATHOLIC LAW, 22, 26 (1957).

qualification, expansion and contraction, and even forfeiture of exercise, as the equal rights of others and the demands of the *common good* from circumstance to circumstance, and from time to time, reasonably indicate. Human rights are absolute only in the sense of the minimal requirements of a just and ordered liberty. (Italics in original.)

This passage was followed by illustrative examples of positive law rules reasonably specifying, qualifying and limiting the *scope* of each one of the natural rights therein enumerated. Following these illustrations, I further explained:<sup>20</sup>

If the scope of natural rights were subject to *unreasonable* or arbitrary limitation, either by the fiat of a dictator or the majority vote of a democracy, then indeed they would be subject to simple extinction and could *not* be said to be absolute. But natural rights still exist in Budapest, no matter how their exercise is frustrated by civil law and brute force, because the Hungarians are still human beings. If, however, the scope of natural rights is subject only to *reasonable* limitation for the sake of the common good, then indeed they are not subject to simple extinction and can *properly* be said to be absolute. Reasonable limitation of scope is a "built-in" attribute of natural and inalienable rights.

For the human person, in his essential nature, is not merely an *individual being*, he is also a *social being* living with his fellows in an external society which is subject to political, economic, technological and social change. Hence, his natural rights (and, of course, obligations) are both individual and social . . . [And] his individual-social nature *adequately* considered leads to the conclusion that his natural rights are absolute, in the sense explained, because he is an individual for whose good governments are instituted; and to the perfectly compatible conclusion that his natural rights are limited in scope, in the sense explained, because he is also a social person obliged by nature to contribute to the common good. (Italics in original.)

It is true therefore, as Professor Goble noted, that natural law *principles* are not subject to "limitations and qualifications," but the *rights* which they measure are subject to the "limitations and qualifications of scope" which are indicated in the principles. Thus, the secondary *principle* that "no one ought to deprive another *unjustly* of his life" (or liberty, or property, or reputation, etc.) is universally true, without exception, qualification or limitation. And the *right* to life (or liberty, or property, or reputation, etc.) which it measures is without exception; but it *is* subject to qualification or limitation of *scope* by *just* or reasonable considerations of the equal rights of others and of obligations to the common good. Hence my natural right to liberty may be *justly* qualified and limited by ten days in the calaboose for disturbing the public peace arguing with Professor Goble, who finds my nice little ideas so confusing and contradictory.

<sup>20</sup> *Id.* at 28.



## V

In his last two articles Professor Goble has placed considerable stress upon a federal case which he deems relevant to our controversy, *Hayes v. Crutcher*.<sup>20a</sup> In my first article I had asked the question: "what fundamental principle, what principle held to be certain, universal and immutable has been relinquished at any time by devotees of the classical natural law?" To which Professor Goble replied, not by naming any such principle, but by naming a Federal District Judge, and asking me to name the principle. He wrote:<sup>21</sup>

In relation to this question I would like to propose the name of Judge Robert N. Wilkin as one who meets all of Father Kenealy's requirements for a classical natural-law lawyer. He has been classified as a neoscholastic and has written extensively upon the subject. In 1952, Judge Wilkin wrote a judicial opinion in which he stated that since it is contrary to nature for black birds, white birds, red birds and blue birds to roost on the same limb of a tree, it is contrary to natural law for colored persons to have a right to the use of a public golf course which by city ordinance was limited to white persons. "It seems," said the judge, "that segregation is not only recognized in constitutional law and judicial decision, but that it is also supported by general principles of natural law." Now, according to Father Kenealy, "natural law philosophers agree on the fundamental principles of the natural law." Since then, it may be assumed that Judge Wilkin and Father Kenealy are in accord on those principles, it is pertinent to ask 1) What fundamental principle of natural law supports segregation and 2) what is the "objective evidence" that proves this principle?

I resolved forthwith never to ask a stupid rhetorical question again—although I have receded somewhat from that resolve in this article. I had never read an article or a judicial opinion by Judge Wilkin before Professor Goble called my attention to *Hayes v. Crutcher*. Since then the case has provided a light touch to my Jurisprudence classes. In all candor I stated that I did not think Judge Wilkin qualified as a natural law philosopher, unless he was the founder of a new school of Bird Natural Law. Shades of Aristotle, Aquinas, Suarez, Hooker, Geny, Maritain and Rommen! However, "for the sake of the point in issue," I assumed that he was a natural law philosopher. But I could not find a single principle in his opinion which even sounded like a natural law principle, fundamental or otherwise. He stated that segregation was "supported" by general principles of natural law, but he did not take the litigants, the public, or the West Publishing Company into his judicial confidence. Wherefore, all I could say was:<sup>22</sup>

In fairness to Judge Wilkin, it should be recalled that he wrote his opinion

<sup>20a</sup> 108 F. Supp. 582 (M.D. Tenn. 1952).

<sup>21</sup> Goble, 2 CATHOLIC LAW. 226, 233 (1956); 108 F. Supp. 582 (M.D. Tenn. 1952).

<sup>22</sup> Kenealy, 3 CATHOLIC LAW. 22, 29-30 (1957).

in 1952 as the judge of a lower federal court before the Supreme Court overruled *Plessy v. Ferguson* in the School Segregation Cases. Nevertheless, it was unfortunate that his *dicta* about birds attempted to link natural law to segregation on golf courses. The answer to Judge Wilkin seems to be that men are not birds, and birds do not play golf. It would be diverting, if somewhat startling, to imagine the logical conclusions from a premise that men should act like birds. It appears that the Judge's argument about the instinctive actions of our feathered friends has no relevance to the rational conduct of human beings at all, but is strictly for the birds. My own opinion about the application of natural law to the issue of compulsory segregation is expressed elsewhere in these pages.

In his latest article Professor Goble is generous in his comment on the merits of the article indicated in the last sentence of the above quotation, *Segregation—A Challenge to the Legal Profession*.<sup>23</sup> Referring to it, however, he argues as follows:<sup>24</sup>

[T]he good Father says: "The fundamental principles of natural law . . . are obviously incompatible with compulsory segregation." So my answer to Father Kenealy's question is that Judge Wilkin has relinquished those fundamental principles of natural law which Father Kenealy says are incompatible with segregation . . . . .

So I return to the question I put in my original article, Whose natural law is the natural law? Father Kenealy's answer, as in all sincerity it must be, is to repudiate Judge Wilkin as a true-blue natural-law lawyer, and to adhere to his own *system*. Judge Wilkin's answer in all sincerity would have to be the repudiation of Father Kenealy and to stick to his *system*. One would think that this incompatibility would raise a little doubt in the mind of one or the other as to whether his *system* was as self-evident, immutable and universal as he contends it to be, and possibly provoke him to say, "Well, I might be wrong." But such an admission would *explode* the *whole* scholastic natural law *doctrine* because it has to be *based* upon certainty and knowability. So this is an event that is not likely to happen. (Italics supplied.)

Professor Goble seems determined to pit me against the Philosopher of the Aviary. Moreover the Professor is so anxious to have Judge Wilkin and myself settle our differences in all sincerity, that he himself has stumbled in all sincerity into a most curious piece of professorial logic. It is clear that Judge Wilkin and I *disagree* on the morality of racial segregation on golf courses. Moreover, the Judge thinks that segregation is "*supported* by general principles of natural law," which he did not disclose or discuss in his opinion; whereas I think that segregation is "*incompatible* with the fundamental principles of natural law," which I did discuss in my article. But by what lyric leap of logic does Professor Goble conclude "that Judge Wilkin

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<sup>23</sup> Kenealy, 3 CATHOLIC LAW, 37 (1957).

<sup>24</sup> Goble, 11 HASTINGS L.J. 95, 107 (1959).

has relinquished those fundamental principles of natural law which Father Kenealy says are incompatible with segregation”?

Professor Goble's logic seems to be based upon the ingenious theory that, whenever two men arrive at contrary conclusions, they must have argued from contrary general principles (*major premises*); or, whenever two men argued from the same general principles, they must arrive at the same particular conclusion. A novel idea, but why? Even when the general principles are the same, is it not possible that contrary empirical judgments about extremely complex fact situations (*minor premises*) may account for the contrary conclusions? And is it not possible that personalities and prejudices, traditions and emotions, may account for aberrations (*logical sports*) in drawing contrary conclusions? If so, where is the logic of the Professor's argumentation? Does he believe that when two Supreme Court justices disagree in applying constitutional “due process” to difficult and complicated fact situations, one of them must have “relinquished” that fundamental principle of constitutional (and natural) law? Logic is not truth, but it is a mighty helpful horse in the chase.

In the light of the foregoing criticism of Professor Goble's logic, it seems significant to point out that one of the premises of his argument was a critically incomplete quotation of my statement: “The fundamental principles of natural law . . . are obviously incompatible with compulsory segregation.” The complete statement, with the critical omission italicized, reads as follows:<sup>25</sup>

The fundamental principles of natural law, which I have attempted to outline in the beginning of these remarks, are obviously incompatible with compulsory segregation *unless: the Negro is not a man; or, if he is a man, then an essentially inferior man; or, if he is not an essentially inferior man, then an accidentally inferior man, whose accidental inferiorities unfit him, as a Negro, for free association with the allegedly superior white man.*

The italicized omission is critical because it indicates the empirical data (*minor premise*) which I utilized in arriving at my conclusion about racial segregation. Moreover, the context of the statement will show that I immediately proceeded to establish my minor premise by appealing to data from “the anthropological, biological, psychological and sociological sciences.”<sup>26</sup> Judge Wilkin, with his irrelevant dicta about birds, apparently drew his minor premise from ornithology or zoology!

As indicated before, the “self-evident” truth enunciated in the Declaration of Independence that “all men are created equal” is not immediately evident in the rigid *philosophical* sense. Apart from the extremely difficult concept of “creation,” the fact is that men are quite *unequal* physically,

<sup>25</sup> Kenealy, 3 CATHOLIC LAW. 37, 42 (1957).

<sup>26</sup> *Id.* at 42-43.

intellectually, morally, socially, artistically, economically, politically, and in many other incidental ways. Therefore it is necessary to prove that these incidental inequalities are irrelevant to the real issue of racial segregation. After all, some of the Founding Fathers and authors of the Declaration of Independence were slave-owners; but they were not necessarily arrant hypocrites. As Judge Taney said in *Dred Scott v. Sanford*:<sup>27</sup>

[Negroes] had for more than a century before been regarded as beings of an *inferior* order, and altogether unfit to associate with the white race, either in social or political relations; and so far *inferior*, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. (Italics added.)

It was, and still is, a bitter struggle to convince people, who believe that "all men are created equal" and who accept the *fundamental principles* of the natural law, to face and accept the *fact* that Negroes are men in the fullest sense of the word; and that, not only slavery, but racial segregation also, is "incompatible" with the essential equality of man and with the fundamental principles of the natural law. But the failure to convince someone of the conclusion does not logically destroy the principles. Much less does Judge Wilkin's ornithological conclusion "explode the whole scholastic natural law doctrine." Neither, I dare say, would the whole "system" of realism or pragmatism or utilitarianism be "exploded" if two realists or pragmatists or utilitarians should disagree as to whether racial segregation is realistic or pragmatic or useful.

## VI

At no time in this long controversy have I attempted to "prove" the scholastic doctrine of the natural law. The fundamental principles, as indicated, cannot be "proved." And we have never gotten beyond the fundamental principles, except to indicate how they differ from all derivative principles; nor have we gotten beyond natural rights, except to indicate how they differ from derivative rights. My total occupation has been to attempt an explanation of that part of the scholastic doctrine of natural law which Professor Goble has criticized, in an effort to show that his criticisms have been invalid because they have been based upon misconceptions of the meaning of that doctrine. That he has, in a word, been chastising the wrong horse. A final point. Professor Goble wrote:<sup>28</sup>

Father Kenealy believes that fundamental principles should not yield to man's broader knowledge or deeper insights, because he is sure that the fundamental principles man now has are "certain, universal and immutable" and therefore perfect and incapable of improvement. This position

<sup>27</sup> 19 U.S. 393, 407 (1856).

<sup>28</sup> Goble, 2 CATHOLIC LAW. 226, 235-36 (1956).

I find myself unable to accept . . . . It is my belief that in the search for truth the mind should not be shackled by unverifiable rules.

It would be much more accurate to say: Father Kenealy believes that, while further experience and accumulating wisdom will undoubtedly give us a deeper appreciation and a better understanding of human nature and of the facts of human existence, nevertheless "man's broader knowledge or deeper insights" will never show or prove that good should *not* be done and evil should *not* be avoided, or that *anyone* should be deprived unjustly of his life, or liberty, or property, or reputation, or any other *essential* human value. The fundamental principles of the natural law, far from shackling the mind in its pursuit of truth, are a few truths the mind can definitely and safely rely upon. They are the immediately evident starting points and directional guides for the pursuit of all other truths in the practical or normative order. Wherefore I had written before:<sup>29</sup>

The construction and maintenance of a *corpus juris* adequately implementing the natural law is a monumental and perpetual task demanding the constant devotion of the best brains and the most mature scholarship of the legal profession. For the fundamental principles of the natural law, universal and immutable as the human nature from which they emanate, require rational application to the constantly changing political, economic and social conditions of civil society. The application of the natural law postulates change as the circumstances of human existence change. It repudiates a naive and smug complacency in the *status quo*. It demands a reasoned acceptance of the good, and a rejection of the bad, in all that is new. It commands a critical search for the better. It requires an exhaustive scrutiny of all the pertinent data of history, politics, economics, sociology, psychology, philosophy, and every other available font of human knowledge. Of primary importance, it insists that the search for a better *corpus juris* be made in the light of the origin, nature, dignity and destiny of man; and in the knowledge of the origin, nature, purpose and limitations of the state.

This is a blueprint for construction, not an obstacle to progress. It is a roadmap for pursuit, not a shackle to search.

In conclusion, I am happy to record, again, my appreciation of the cordial spirit and scholarly manner in which Professor Goble has responded to my criticisms of his criticisms of scholastic natural law. We are both pursuing the truth—the objective truth. We pursue it with the disadvantage of discordant terminologies. But we pursue it with the pleasant advantage of mutual respect and friendship.

<sup>29</sup> Kenealy, 1 CATHOLIC LAW, 259, 260 (1955).